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No. 84-919

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

NEW YORK UNIVERSITY MEDICAL CENTER,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

*Respondents.*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether there remains any issue in this case which should be considered by this Court.

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NEW YORK UNIVERSITY MEDICAL CENTER, PETITIONER

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT

This petition for certiorari is without merit. The petitioner seeks to further delay the reinstatement of intervenor Benin. Five years and three months have already elapsed since the intervenors showed majority support in the union election (P.2a of petition for certiorari).* Five years and three months have passed in which union members at respondent medical center have been disenfranchised.

*Citations to appendices refer to the appendices contained in the Medical Center's petition.

There are no issues appropriate for review. The Court of Appeals made the factual finding that the contents of the leaflets were not a threat to plant discipline (11a). Moreover, the leaflets were an essential means to enable a dissident faction to communicate with the rest of the rank and file (11a). Since the allegations of illegal searches were based on reports from employers they are not defamatory under the standard of Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966). Further, the Medical Center admitted that the searches took place. The Medical Center's claim that the leaflets constituted disloyalty was rejected by the Court of Appeals (13a). The purpose and effect of the leaflets was to criticize labor relations policies of the Medical Center and garner support for a dissident union group (10a). Having upheld these factual determinations, the Court of Appeals confirmed that the leafletting was protected under Section

7 of the National Labor Relations Act and that discipline that stemmed directly from this leafletting violated Section 8(a)(1) of the Act (13a).

On remand from the Supreme Court, the Court of Appeals enforced (1aa, 2aa) the Board's finding that the General Counsel had established the leafletting as a "motivating factor" in the discharge of Benin and suspension of Vargas and that respondent had not demonstrated that said discipline would have occurred absent the protected activity (38a, 39a).

The Court of Appeals also affirmed the decision of the Board not to defer to the arbitrator's finding (7a). The decision not to defer was based on the fact that the leaflets clearly deserved protection under the Act. Such deferral, therefore, was not an abuse of discretion (7a).

REASONS FOR DENYING THE PETITION

This Court has already reviewed the Wright

Line[1] mixed motive issue and remanded for decision consistent with National Labor Relation Board v. Transportation Management Corp._____U.S._____103. Ct. 2469 (1983). There are no other unsettled issues or issues worthy of review. The mainly factual determinations of the Board have been reviewed and upheld by the Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Benin Vargas and Berkowitz

Dated: December 31, 1984
New Rochelle, New York 10801

[1] Wright Line, a Division of Wright Line, Inc. 251 NLRB 1083, enforced, 662 F.2d 899, cert. denied, 455 U.S. 989 (1982)